

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEBRASKA

OMAHA COLD STORAGE TERMINALS)	
INC.,)	
)	
Plaintiff,)	8:07CV11
)	
v.)	
)	
PRESTON REFRIGERATION CO.,)	ORDER
INC.,)	
)	
Defendant.)	
_____)	

This matter is before the Court on defendant's amended motion to dismiss pursuant to the doctrine of *res judicata* and pursuant to Rule 12(B)(6) (Filing No. 6). Having reviewed the motion, the parties' submissions, and the applicable law, the Court finds that defendant's motion to dismiss should be denied.

In a motion to dismiss, the defendant bears the burden of demonstrating that the plaintiff can prove no set of facts which would entitle it to relief. *Young v. City of St. Charles*, 244 F.3d 623, 627 (8th Cir. 2001). While there is no indication that defendant's state court claims based on the Fort Dodge Site were formally dismissed, defendant admits that it presented no evidence at the state court trial on these claims. Also, the state court made no findings as to the Fort Dodge Site and specifically stated that the Fort Dodge Site was "not part of [the state court] lawsuit" (Filing No. 7, Ex. 5 at ¶7). The Court finds defendant has failed to meet its burden to

demonstrate that the plaintiff can prove no set of facts which would entitle it to relief; therefore, defendant's motion to dismiss will be denied. Accordingly,

IT IS ORDERED:

1) Defendant's amended motion to dismiss pursuant to the doctrine of *res judicata* and pursuant to Rule 12(B)(6) is denied; and

2) Defendant's motion to stay Rule 26 disclosures and discovery (Filing No. 26) is denied as moot. The parties shall submit their Rule 26 disclosures and discovery no later than July 13, 2007.

DATED this 12th day of June, 2007.

BY THE COURT:

/s/ Lyle E. Strom

LYLE E. STROM, Senior Judge
United States District Court